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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. JOHN PAUL RHODES, Defendant and Appellant.	A096121 (Sonoma County Super. Ct. No. SCR30587)

John Paul Rhodes appeals from a judgment of conviction entered on his plea of no contest to possession of methamphetamine for sale and admission of an enhancement. (Health & Saf. §§ 11378, 11370.2, subd. (c).)[1] We requested supplemental briefing after reviewing the record pursuant to *People v. Wende* (1979) 25 Cal.3d 436. After careful consideration of the issues as briefed by both parties, we will order a correction of the abstract of judgment and as corrected, affirm.

BACKGROUND

Appellant was arrested on May 24, 2000 when the Sonoma County Narcotics Task Force conducted a probation search of his home. In the May 2000 search, agents found 6.79 ounces of methamphetamine packaged in 7 small baggies, 2.17 ounces of methamphetamine in a bathroom closet, pay-owe sheets, a cellular telephone and a pager.

[1] Unless otherwise indicated, all statutory references are to the Health and Safety Code.

The district attorney filed an information on April 9, 2001, charging appellant with possession for sale of methamphetamine. The information also alleged probation ineligibility and a prior conviction of violating section 11378, for purposes of the three-year enhancement under section 11370.2, subdivision (c).[2]

On July 2, 2001, appellant appeared in court with counsel to enter a plea. Defense counsel told the court: "It's my understanding that [the] court has given an indicated . . . four years four months as a top, and it would leave open any other arguments for the concurrent time or any other arguments that we may make to adjust the sentence downward from there." The court confirmed that understanding. After being properly advised, appellant waived his constitutional rights and entered a plea of no contest to possession for sale of methamphetamine. Appellant admitted a Penal Code section 1203.073, subdivision (b)(2) probation restriction for possessing 57 grams or more of methamphetamine. He also admitted that he had been convicted of a prior violation of section 11378 on November 17, 1998 in Napa County.

The probation department prepared a presentence report making the following observations. "[Appellant] is precluded from receiving a probation grant unless the court determines that [he] meets certain criteria for probation consideration as an unusual case. [¶] Probation has been unable to identify any factors applicable to this defendant which would make this an unusual case."

". . . He was on a grant of formal probation for narcotics sales at the time he was arrested for the present offense. His history of drug abuse could negatively impact his ability to comply with a grant of probation. His prior record indicates a pattern of regular

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[2] Section 11370.2, subdivision (c) provides: "Any person convicted of a violation of, or of a conspiracy to violate, Section 11378 or 11379 with respect to any substance containing a controlled substance . . . shall receive, in addition to any other punishment authorized by law, including Section 667.5 of the Penal Code, a full, separate, and consecutive three-year term for each prior felony conviction of, or for each prior felony conviction of conspiracy to violate, Section 11351, 11351.5, 11352, 11378, 11378.5, 11379, 11379.5, 11379.6, 11380, 11380.5, or 11383, whether or not the prior conviction resulted in a term of imprisonment."

and increasingly serious criminal conduct. The manner in which the crime was carried out demonstrates criminal sophistication and professionalism on the part of the defendant."

With regard to circumstances in aggravation and mitigation the report states:

"The crime involved a large quantity of contraband. . . . The defendant's prior convictions as an adult are numerous and of increasing seriousness. . . . The defendant was on probation at the time the crime was committed."

"The defendant's first grant of conditional sentence in 1993 was completed satisfactorily.[3] His second grant in 1998 also terminated normally."[4]

In the "Evaluation" section of the probation report the probation officer states:

"[T]he defendant was found with nine ounces of methamphetamine and $7,000 in currency. Such a bounty causes suspicion that Mr. Rhodes was fairly well connected and certainly successful in his profession. . . . Relative to his prior conviction, the defendant denied selling drugs and said they were for personal use only. While this is possible, the fact that he had a hand gun with available ammunition is quite disturbing. Moreover, the defendant was on felony probation in Napa County when he opted into this latest business venture."

"While it is somewhat understandable that the defendant believes his prognosis for a probation grant is poor, he also deprives the court of information which may be helpful in sentencing. Such information may very well be crucial in evaluating the applicability of Rule 4.413 [unusual circumstances warranting a grant of probation to a defendant otherwise ineligible] vis a vis the defendant."

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[3] In 1993, when appellant was 19, he suffered a misdemeanor conviction for violating Penal Code section 415 (public fighting) and successfully completed unsupervised probation.

[4] The reference here is to appellant's Sonoma County misdemeanor convictions. His Napa County felony probation for the 1998 conviction of possession of drugs for sale was revoked and he was sent to prison.

"Although the defendant might perform well on a grant of probation, we are unable to recommend such a disposition because of the sheer quantity of drugs and currency involved. We believe that such mid-scale drug dealers should not be treated lightly by our courts. We find that the factors in aggravation do not outweigh the factor in mitigation and the mid-term is appropriate. We also note that the defendant has admitted a three year enhancement pursuant to 11370 H&S which brings the aggregate term to five years."

Appellant appeared for sentencing on August 22, 2001. Defense counsel agreed with the prosecutor that appellant was not eligible for probation. When the court indicated that the four-year four-month sentence was "the least I can do," defense counsel agreed, saying: "It's the least amount of time the court could sentence him to so I'm not going to argue obviously for a lesser sentence." Counsel did not mention the court's ability to strike the three-year enhancement under Penal Code section 1385.[5] (See *People v. Bradley* (1998) 64 Cal.App.4th 386, 391, fn. 2.)

Counsel argued: "What I would be asking the court to consider is Mr. Rhodes was—there was a hold placed on Mr. Rhodes as of June of 2000, and what I would ask the court to do is sentence him concurrent with the time he was serving in Napa as of the date the hold was placed on him so that he can get credit for that time." The prosecutor responded that appellant was serving a prison sentence for a prior conviction in Napa, and "He would not normally . . . be entitled to dual credits . . . in this case." The court responded: "[I]t's an entirely separate offense in Napa" and denied the request to run the sentence concurrent with the Napa County matter.

The court commented: "It is true . . . that I have gone as far as I can go with regard to sentencing, and it's true that probation because they didn't discuss the absolute

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[5] Although, in 1997, the California Legislature deleted the provision of Penal Code section 1170.1 that permitted a court to strike a section 11370.2 enhancement, it expressly stated that the deletion was not intended to alter the court's existing authority to strike enhancements under Penal Code section 1385. (*People v. Bradley, supra,* 64 Cal.App.4th 386, 391, fn. 2.)

preclusion, did discuss that he could possibly be a good candidate. On the other hand, they also said if he were sent to prison, it ought to be for five years so I kind of think that I—there's no particular reason for me to cut him any further slack, as it were." The court imposed a sentence of four years four months, composed of the mitigated term of sixteen months for the section 11378 violation and a consecutive term of three years for the section 11370.2, subdivision (c) enhancement.[6]

Appellant filed a timely notice of appeal. His counsel filed a brief raising no issues and asking this court to review the record pursuant to *People v. Wende, supra,* 25 Cal.3d 436. Following our review, we requested supplemental briefing on whether appellant received ineffective assistance of counsel because counsel: (1) failed to remind the court that the four-year four-month sentence was a maximum agreed sentence; (2) failed to argue that the court could strike the alleged prior under Penal Code section 1385; and (3) failed to adequately investigate the basis for appellant's probation revocation in Napa County so that counsel would have known whether there was a factual and legal basis for the court to grant appellant dual credits for the Napa and Sonoma matters.

DISCUSSION

Failure to Argue for a Lesser Sentence

At the time appellant changed his plea, the agreement as stated was that the term of four years four months was a maximum sentence, and that counsel could argue for concurrent time "or any other arguments that we may make to adjust the sentence downward from there." At the time that sentence was imposed, defense counsel argued for concurrent time, but did not argue for a lesser sentence.

As noted by the Attorney General, the first two issues listed in our request for supplemental briefing are related. Because the court had already imposed the minimum

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[6] The sentence was erroneously recorded on the abstract of judgment as two years for the section 11378 violation plus 2 years 4 months for the section 11370.2 enhancement. We will order correction of the abstract of judgment.

term on count one, the only way to impose a lesser term was to strike the enhancement. Thus, the issue amounts to whether counsel was ineffective for failing to move to strike the enhancement.

"The pleading—and plea bargaining—stage of a criminal proceeding is a critical stage in the criminal process at which a defendant is entitled to the effective assistance of counsel guaranteed by the federal and California Constitutions. [Citations.]" (*In re Alvernaz* (1992) 2 Cal.4th 924, 933.) In order to show that he received ineffective assistance of counsel at sentencing, appellant must show that counsel's performance fell below an objective standard of reasonableness and the reasonable probability that, but for counsel's error, the result of the proceeding would have been different. (*Strickland v. Washington* (1984) 466 U.S. 668, 688, 694.)

"Counsel's duty at sentencing is to be familiar with the sentencing alternatives available to the court, to make sure that the court is aware of such alternatives, to explain to his or her client the consequences of the various dispositions available and to be certain that the sentence imposed is based on complete and accurate information. [Citations.]" (*People v. Cotton* (1991) 230 Cal.App.3d 1072, 1085-1086.)

Appellant's counsel had little with which to argue. Appellant's history showed an escalating course of criminal behavior. On March 10, 1998, when appellant was 24, he kicked in his girlfriend's front door and assaulted her. He was arrested in Napa County the next day. A search incident to that arrest uncovered an unloaded handgun and ammunition in the vehicle as well as 2.8 grams of cocaine, 2.5 grams of methamphetamine, 1.9 ounces of marijuana, a small electronic scale, and $1,554 in cash. He was convicted in Napa County of violating section 11378 (possession of a controlled substance for sale) and in Sonoma County of violating Penal Code sections 594, subdivision (a) (vandalism) and 602, subdivision (l) (trespass). He was admitted to probation in both counties.

The instant case started with a probation search of appellant's house on May 24, 2000. The officers found 6.79 ounces of methamphetamine packaged in 7 small baggies and another 2.17 ounces hidden in a closet. Thus, over half a pound of methamphetamine

was in the house. Officers also found $7,076 in cash, pay/owe sheets and a digital gram scale. In addition, they found a radio frequency scanner and a video camera directed toward the front porch of the house.

Appellant was a drug dealer who fell well within the enhancement's purpose of additional punishment for recidivist drug dealers. Nothing in the record indicates the trial court could or would impose any lesser aggregate sentence. Moreover, appellant's certificate of probable cause for this appeal shows that his concern is not with the Sonoma County court's four-year four-month sentence, but only with the way in which the concurrent sentence was handled.

No reasonable probability appears in the record that the court would have sentenced differently if counsel had argued for a lesser sentence. The trial court indicated it had gone as far as it would with its discretion in considering mitigating factors, and would not "cut him any further slack."

Failure To Investigate Basis of Napa County Incarceration

The other issue on which we requested briefing was whether counsel failed to adequately investigate the basis for the probation revocation in Napa County so that counsel could have advised the court as to whether there was a basis for granting dual credits.

Counsel asked the court to run the current sentence concurrent with appellant's sentence in the Napa case because: "four years, four months is a long time given [appellant's] background and his record and the fact that probation felt that were he eligible, he might be a candidate for probation." When the prosecutor argued that appellant had been serving a separate prison term on the Napa matter, defense counsel was mute. The court concluded: "I think that it's an entirely separate offense in Napa . . . ."

The court could not have granted dual credit based on defense counsel's argument about the equities of the case. Penal Code section 2900.5, subdivision (b) provides: "credit shall be given only where the custody to be credited is attributable to proceedings related to the same conduct for which the defendant has been convicted." The defendant

requesting custody credit must show that the present offense was a "but for" cause of the earlier restraint. (*People v. Bruner* (1995) 9 Cal.4th 1178, 1194.)

Appellant's presentence report contained a strong indication that the probation violation and appellant's subsequent prison term in the Napa matter were caused solely by his arrest in this case.[7] Counsel should have had the information available to support the request for dual credit.

However, as appellant concedes, the record on appeal does not affirmatively prove whether or not defense counsel adequately investigated the basis for the probation revocation in Napa County. It is possible that counsel did investigate and discovered that appellant's incarceration was due to additional causes. In light of this deficiency in the record on appeal, the argument must be rejected.

CONCLUSION

The abstract of judgment is ordered corrected to reflect that appellant's sentence of four years four months is composed of the mitigated term of sixteen months for the 11378 violation and a consecutive term of three years for the section 11370.2, subdivision (c) enhancement. Upon issuance of the remittitur, the clerk of the superior court is directed to forward a copy of the amended abstract of judgment to the California Department of Corrections. The judgment is affirmed in all other respects.[8]

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[7] The court in *Bruner* cited *People v. Williams* (1992) 10 Cal.App.4th 827 as an example of a "but for" cause where a probation revocation was caused solely by the defendant's current arrest. (*People v. Bruner, supra,* 9 Cal.4th 1178, 1193-1194, fn. 10.)

[8] Concurrently with the filing of this opinion in the instant case, we have filed an order denying appellant's petition for writ of habeas corpus in case number A0 99573.

Marchiano, P.J.

We concur:

Stein, J.

Swager, J.